



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

is in accord with the authorities on the nature of the responsibility of the carrier of goods.<sup>19</sup>

A recent case adopts the test suggested, and points out a further requisite for imposing liability as insurer. *Hasbrouck v. New York Central & Hudson River R. Co.*, 202 N. Y. 363, 95 N. E. 808. A trainman of the defendant railway, who was assisting the plaintiff in changing cars, had her handgrip for about fifteen minutes in the front of the car. For a loss of goods from the handgrip, the railway was held responsible only for due care. Although the railway had possession, it was merely temporary, while rendering a service incidental to the carriage of a passenger. Thus, to be liable as insurer, the carrier must hold the goods as carrier.<sup>20</sup> Mere possession is not enough.<sup>21</sup> That the possession is in the regular course of business should not produce a contrary result,<sup>22</sup> for of such character is the carrier's possession after completion of the journey, when due care only is required.<sup>23</sup> The principal case should aid in producing a more desirable state of the authorities.

---

EXTENT OF VALID WAIVER OF CRIMINAL PROCEDURE. — Many incidents of the usual criminal trial procedure may be waived by the defendant without rendering his conviction invalid. Examples of this are his waiver of a formal arraignment,<sup>1</sup> specification of the charges against him,<sup>2</sup> personal presence at the trial,<sup>3</sup> and the right to be confronted by witnesses.<sup>4</sup> An accused may agree to be bound by the verdict in the case of a co-defendant.<sup>5</sup> The incidents waived may be assured to him by constitutions,<sup>6</sup> by statutes,<sup>7</sup> or by the common law.<sup>8</sup> But waiver of a jury trial is invalid;<sup>9</sup> similarly, if the jury have not been sworn a conviction is invalid;<sup>10</sup> and, by the weight of authority, a trial by a jury of less than twelve, though assented to by the accused, is illegal.<sup>11</sup> In

---

<sup>19</sup> Undoubtedly, difficult questions of fact will arise as to what constitutes assumption of possession by the carrier. See *Nashville, Chattanooga & St. Louis Ry. Co. v. Lillie*, 112 Tenn. 331, 78 S. W. 1055.

<sup>20</sup> *Holmes v. North German Lloyd Steamship Co.*, 184 N. Y. 280, 77 N. E. 21.

<sup>21</sup> The carrier may hold the goods as warehouseman. *Laffrey v. Grummond*, 74 Mich. 186. He may have possession momentarily while assisting a passenger to board a street car. *Sperry v. Consolidated Ry. Co.*, 79 Conn. 565, 65 Atl. 962.

<sup>22</sup> *Holmes v. North German Lloyd Steamship Co.*, *supra*. *Contra*, *Butcher v. London & South Western Ry. Co.*, 16 C. B. 13. See WYMAN, PUBLIC SERVICE CORPORATIONS, § 769.

<sup>23</sup> *Laffrey v. Grummond*, *supra*.

<sup>1</sup> *Hack v. State*, 141 Wis. 346, 124 N. W. 492. *Contra*, *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952.

<sup>2</sup> *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783, 1020.

<sup>3</sup> *People v. Thorn*, 156 N. Y. 286, 50 N. E. 947.

<sup>4</sup> *Odell v. State*, 44 Tex. Cr. R. 307, 70 S. W. 964; *State v. Olds*, 106 Ia. 110, 76 N. W.

644.

<sup>5</sup> Anonymous, 3 Salk. 317.

<sup>6</sup> *Williams v. State*, 61 Wis. 281, 21 N. W. 56.

<sup>7</sup> *Flynn v. State*, 97 Wis. 44, 72 N. W. 373.

<sup>8</sup> *Wells v. State*, 16 S. W. 577 (Ark.).

<sup>9</sup> *Harris v. People*, 128 Ill. 585, 21 N. E. 563.

<sup>10</sup> *Slaughter v. State*, 100 Ga. 323, 28 S. E. 159.

<sup>11</sup> *Dickinson v. United States*, 159 Fed. 801. *Contra*, *State v. Sackett*, 39 Minn. 69, 38 N. W. 773.

a recent case, after all the evidence was in, one of the jurors was changed, and all the jurors were then sworn. The only evidence presented to these jurors was the reading of the testimony which had been taken before the original jurors. The accused consented to these proceedings. But it was held that the conviction was illegal. *People v. Toledo*, 72 N. Y. Misc. 635, 130 N. Y. Supp. 440.

The extent of valid waiver must be determined by the purpose of the procedural system and its particular elements. The system itself aims to secure a rational trial. The protection of the accused is the basis of some of its incidents;<sup>12</sup> that of others is said to be a public interest in assuring to him such protection, even against his own will.<sup>13</sup> In so far as any rule is for the benefit of the accused alone, the validity of his waiver should be unquestioned.<sup>14</sup> But the basic theory of our trial procedure requires that his waiver shall not make the trial irrational. The only other limitations arise from the theory of public interest, and are ascertainable by determining its meaning, its reasonableness, and its present scope.

Definition of the theory of public interest is difficult because the decisions have not attempted it. The meaning cannot be that fairness to the accused requires the usual procedure, unchanged; on the contrary, his waiver may be a convenience, and even a source of protection, to him;<sup>15</sup> and, if anything, the accused is today over-protected.<sup>16</sup> Nor can it mean that procedural changes will be prejudicial to the state as a party; a rational trial is sufficient for the protection of the state in criminal trials. The theory may be merely an example of over-tender regard for the accused; or, possibly, it is a survival of the eighteenth-century notion of an arbitrary magistracy against which the people must be protected.<sup>17</sup> The latter is the more likely, because the theory has been applied only where the principles of constitutional construction require the adoption of views current at the time of the adoption of the American constitutions. Under either explanation, however, it is today logically indefensible.<sup>18</sup> It has never been extended to some of our earliest constitutional provisions.<sup>19</sup> Latterly, the United States Supreme Court has indirectly declared against such a theory.<sup>20</sup> It finds its chief expression in the prohibition of the waiver of trial by jury, and such trial features as may be said to be inseparable from the conception of jury trial.<sup>21</sup> The final question then becomes one of determining what is an integral part of a trial by jury, as provided for constitution-

<sup>12</sup> *State v. Woodling*, 53 Minn. 142, 54 N. W. 1068.

<sup>13</sup> *Cancemi v. People*, 18 N. Y. 128.

<sup>14</sup> *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826; *State v. Polson*, 29 Ia. 133.

<sup>15</sup> *State v. Kaufman*, 51 Ia. 578, 2 N. W. 275; *Commonwealth v. Dailey*, 12 Cush. (Mass.) 80.

<sup>16</sup> See TAFT, PRESENT DAY PROBLEMS, 343-353.

<sup>17</sup> See *Ex parte Bain*, 121 U. S. 1, 12, 7 Sup. Ct. 781; THE FEDERALIST, No. 83; 3 WASHINGTON, WRITINGS OF THOMAS JEFFERSON, 81-82; MCCLAIN, CONSTITUTIONAL LAW, § 254.

<sup>18</sup> See MCCLAIN, CONSTITUTIONAL LAW, § 254.

<sup>19</sup> *State v. Mitchell*, *supra*; *Dula v. State*, 8 Verg. (Tenn.) 511.

<sup>20</sup> *Hawaii v. Mankichi*, 190 U. S. 197, 23 Sup. Ct. 787; *Dorr v. United States*, 195 U. S. 138, 24 Sup. Ct. 808.

<sup>21</sup> *Cancemi v. People*, *supra*.

ally. And since the interpretation which makes it impossible to waive a jury is due to an old conception no longer accepted, the theory of public interest should be limited as closely as possible in its application.

**DOWER AS SUBJECT TO INHERITANCE TAX.** — An important question in the construction of inheritance tax laws is whether dower comes within their scope. A recent Tennessee decision holds that under a statute taxing property passing "under the intestate laws" dower is not taxable. *Crenshaw v. Moore*, 137 S. W. 924 (Tenn.).<sup>1</sup> Illinois under an identical statute adopted the contrary rule.<sup>2</sup>

In deciding the question as to what is covered by inheritance taxes, the general intention of legislatures in passing such laws must be subordinated to the meaning of the words used to express that intention. The mere fact that the transfer of property occurs on the death of an intestate does not show that it passes under "intestate laws." The term "intestate laws" refers only to the laws "governing intestate succession."<sup>3</sup> Clearly all property of an intestate is not subject to the inheritance tax, as for example that which is applied to the payment of the debts of the deceased; for "it is recognized by . . . courts generally that a tax of this character is not a tax on property as such but one upon the right of succession."<sup>4</sup>

Is dower a form of succession? Its origin is probably to be found in an early Germanic custom of the husband's giving the wife a *dos* on marriage.<sup>5</sup> In Saxon times the widow was supported wholly out of the personal estate, and not until the Norman conquest did dower in land arise. Blackstone says that the reason our law adopted it was "for the sustenance of the wife, and the nurture and education of the younger children."<sup>6</sup> The right has always been treated with the greatest solicitude until modern times,<sup>7</sup> and as far back as *Magna Charta*, the widow was freed from the burden of fine and relief, to which all heirs and alienees were subject.<sup>8</sup> This early special privilege marks a difference between inheritance and dower which is due to the complete lack of connection between dower and the rules of descent; and in fact the widow's estate is a temporary dislocation of these rules. Furthermore before the husband's death the right to dower, although not vested,<sup>9</sup> is still a contingent right of sufficient importance to be a subject of judicial protection,<sup>10</sup>

<sup>1</sup> The same conclusion has been reached under a code. Succession of Marsal, 118 La. 211. And it has been so held with respect to curtesy. *In re Starbuck's Estate*, 63 N. Y. Misc. 156, 116 N. Y. Supp. 1030, aff. 137 N. Y. App. Div. 866, 122 N. Y. Supp. 584.

<sup>2</sup> *Billings v. People*, 189 Ill. 472, 59 N. E. 798.

<sup>3</sup> See *In re Joyslin's Estate*, 76 Vt. 88, 92, 56 Atl. 281.

<sup>4</sup> See *In re Kennedy's Estate*, 157 Cal. 517, 523, 108 Pac. 280, 282.

<sup>5</sup> See 1 SCRIBNER, DOWER, 2 ed., ch. 1, § 5.

<sup>6</sup> See BL. COMM., Bk. II., § 129.

<sup>7</sup> See 1 SCRIBNER, DOWER, 2 ed., ch. 1, §§ 32, 33.

<sup>8</sup> See *id.*, § 15.

<sup>9</sup> *Virgin v. Virgin*, 91 Ill. App. 188; *Boyd v. Harrison*, 36 Ala. 533. But see 2 SCRIBNER, DOWER, 2 ed., ch. 1, §§ 7-18.

<sup>10</sup> *Atwood v. Arnold*, 23 R. I. 609, 51 Atl. 216.